

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

OCEAN VIEW SCHOOL DISTRICT,
HUNTINGTON BEACH UNION HIGH
SCHOOL DISTRICT AND CALIFORNIA
CHILDREN'S SERVICES.

OAH CASE NO. 2014070277

ORDER (1) DENYING CALIFORNIA
CHILDREN'S SERVICES MOTION TO
DISMISS, AND (2) GRANTING
MOTION TO LIMIT ISSUES

On June 30, 2014, Parents on behalf of Student filed a due process hearing request (complaint), naming Ocean View School District (Ocean View), Huntington Beach Union High School District (Huntington Beach) (collectively School Districts) and California Children's Services (CCS).

On August 4, 2014, CCS filed a motion to dismiss, or in the alternative, to limit issues. On August 7, 2014, Ocean View and Huntington Beach filed a joint opposition to the motion to dismiss. Also on August 7, 2014, Student filed an opposition to the motion to dismiss and non-opposition to the motion to limit issues.

Student's complaint alleges that he is quadriplegic, but that his cognitive potential is unknown due to inadequate assessment and lack of access to augmentative and alternative communication (AAC) devices. Student alleges that his ability to use AAC devices, interact with teachers and peers, move to minimize discomfort, and engage in physical activities has been adversely impacted by inadequate AAC services, AAC devices, speech therapy, physical therapy (PT) and occupational therapy (OT) services. Student alleges that these problems are partly due to CCS' inadequate assessment of Student and unilateral discontinuation PT and OT services in Student's individualized education program (IEP) as not medically necessary. The complaint alleges a denial of a free appropriate public education (FAPE) by School Districts and CCS extending back more than two years from the filing of Student's complaint because of a tolling agreement covering May 2014 through June 2014.

CCS argues that the Office of Administrative Hearings (OAH) does not have jurisdiction over Student's claims raised against it. Specifically, CCS contends that it is only responsible for provision of medically necessary services for Student as defined by statute, and not for the provision of a FAPE; that OAH has no authority to determine what

constitutes medically necessary services; that there is another administrative forum where any disputes and/or issues pertaining to CCS' medical necessity determinations are properly litigated, and that Student is forum shopping. CCS also argues that the two year statute of limitations should apply because CCS was not a party to the tolling agreement.

Student's opposition contends that CCS is a public agency as defined by federal and state law, and that state law pertaining to interagency responsibilities permits disputes over CCS' assessment and provision of services to be adjudicated in a due process proceeding. School Districts' opposition contends that California law is clear in providing that any public agency involved in decisions regarding a student may be a party to a due process proceeding, and references a long line of OAH orders denying similar CCS motions to dismiss.

APPLICABLE LAW

Special education due process hearing procedures extend to the parent or guardian, to the student in certain circumstances, and to "the public agency involved in any decisions regarding a pupil." (Ed. Code, § 56501, subd. (a).) A "public agency" is defined as "a school district, county office of education, special education local plan area . . . or any other public agency . . . providing special education or related services to individuals with exceptional needs." (Ed. Code, §§ 56500 and 56028.5.)

The purpose of the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et. seq. (IDEA)) is to ensure that all children with disabilities have available to a FAPE, and to protect the rights of those children and their parents. (20 U.S.C. § 1400(d)(1)(A), (B), and (C); see also Ed. Code, § 56000.) A party has the right to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a).) The jurisdiction of OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9).) Special education related services, called designated instruction and services in California, include, in pertinent part, developmental, corrective, and supportive services, such as PT and OT, as may be required to assist a child with a disability to benefit from special education. (20 U.S.C. §1401(a)(26); Ed. Code, § 56363.)

Before 1984, the responsibility to provide related services under IEP's was imposed on state and local educational agencies only. Under then-existing law, it was held that CCS was not properly joined as a party to a special education due process hearing because the federal statutory scheme (then the Education for All Handicapped Children Act, the predecessor to the IDEA) placed responsibility for the delivery of special education and related services solely on public education agencies. (*Nevada County Office of Educ. v. Riles*

(1983) 149 Cal.App.3d 767, 775-776 (*Nevada County*).) However, Chapter 26.5 of Title 1, Division 7 of the Government Code (Gov. Code, § 7570, et seq. [entitled “Interagency Responsibilities for Related Services”] (Chapter 26.5)), added by AB 3632 in 1984, imposed on CCS and other noneducational state agencies obligations to deliver related services under a child’s IEP.

Pursuant to Chapter 26.5, it is the joint responsibility of the Superintendent of Public Instruction (Superintendent) and the Secretary of Health and Human Services (Secretary) to ensure maximum utilization of resources to provide a child with a disability with a FAPE. Government Code section 7575 states, in pertinent part:

(a)(1) Notwithstanding any other provision of law, the State Department of Health Services, or any designated local agency administering the California Children's Services, shall be responsible for the provision of medically necessary occupational therapy and physical therapy, as specified by Article 5 (commencing with Section 123800) of Chapter 3 of Part 2 of Division 106 of the Health and Safety Code, by reason of medical diagnosis and *when contained in the child's individualized education program.* (italics added.)

(2) Related services or designated instruction and services not deemed to be medically necessary by the State Department of Health Services, that the individualized education program team determines are necessary in order to assist a child to benefit from special education, shall be provided by the local education agency by qualified personnel whose employment standards are covered by the Education Code and implementing regulations.

(b) The department shall determine whether a California Children's Services eligible pupil, or a pupil with a private medical referral needs medically necessary occupational therapy or physical therapy. A medical referral shall be based on a written report from a licensed physician and surgeon who has examined the pupil.

Pursuant to Chapter 26.5, all state departments and their designated local agencies are governed by the procedural safeguards required by the IDEA. (Gov. Code, § 7586(a).) Chapter 26.5 provides for resolution of disputes arising over a related service or designated instruction designated in that chapter by either (i) submission of a complaint to the Superintendent or Secretary, or (ii) through the special education due process hearing process established in Chapter 5 (commencing with Section 56500) of Part 30 of Division 4 of the Education Code. (Gov. Code, §§ 7585 and 7586, respectively.) A decision issued in a due

process hearing is binding on the department having responsibility for the services in issue under Chapter 26.5. (Gov. Code, § 7586, subd. (a).)¹

All hearings requests that involve multiple services that are the responsibility of more than one state department shall give rise to one hearing with all responsible state or local agencies joined as parties. (Gov. Code, § 7586, subd. (c).)

DISCUSSION

Student's complaint alleges that CCS inadequately assessed Student's need for PT and OT services to access his education, and unilaterally discontinued OT and PT services which were contained in Student's IEP, which resulted in procedural and substantive denials of FAPE.

CCS argues that OAH does not have jurisdiction over it because it provides only medically necessary, as opposed to educationally required, PT and OT and interagency dispute procedures are the proper channel for challenging CCS's determination of medical necessity, citing *Nevada County*. However, *Nevada County*, published on December 12, 1983, did not analyze Chapter 26.5, which was first enacted in 1984. That opinion did not parse California's current statutory scheme for interagency responsibilities for related services, and Chapter 26.5 expressly provides that a dispute arising over a related service or designated instruction designated in that chapter may be determined in a special education due process hearing. (Gov. Code, § 7586, subd. (a).) Here, Student has alleged that CCS was involved in assessments of Student and providing services under his IEP. A dispute over provision of services under Chapter 26.5 is clearly within OAH jurisdiction, and a decision issued on this dispute will be binding on CCS.

More importantly, whether CCS was providing only medically necessary services or had assumed responsibility for (i) assessment of the impact of Student's physical disabilities on Student's access to education or (ii) provision of educationally related PT and OT services, are questions of fact. Whether CCS had in fact made a determination that Student's PT and OT services were no longer medically necessary, and whether CCS followed the proper procedure for discontinuation of services called for in an IEP, are factually specific questions separate from and not involving a challenge to a medical necessity determination. The determination of which public agencies are responsible for providing Student with a FAPE, by contract or statute, and whether or not those agencies have met their obligations, is precisely the type of factual inquiry intended for a due process hearing under the IDEA and Chapter 26.5. (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a); Gov. Code, § 7586.)

¹ The delivery of mental health services under Chapter 26.5 underwent major revision in 2011 (see *California School Boards Assn. v. Brown* (2011) 192 Cal.App.4th 1507), but the revision did not affect the obligations of CCS to provide PT and OT, or OAH's jurisdiction over disputes.

The necessity of a factual inquiry to determine the parties' educationally related obligations to Student, if any, is also apparent from CCS' inclusion of a copy of the *Interagency Agreement Between Local Education Agency and State Department of Children Medical Services Branch, California Children Services, County of Orange* (Interagency Agreement) in its moving papers. The stated purpose of the Interagency Agreement is to "determine, clarify and coordinate each agency's responsibilities to the student/client," and allocates responsibilities between CCS and participating local educational agencies, including School Districts. This document suggests that CCS may have contractual as well as statutory responsibilities to Student. CCS contends that the question of OAH jurisdiction over CCS is controlled by the Interagency Agreement and therefore CCS must be dismissed as a matter of law, but this argument is more correctly characterized as a request for judgment in CCS's favor under that contract, and OAH does not hear motions for summary judgment in special education due process proceedings. The Interagency Agreement provides information on the contractual allocation of responsibility for assessments and services among the participating agencies, but the determination of responsibility requires a factual inquiry on evidence produced, and does not affect the Student's right to independently seek a due process hearing before OAH as prescribed by Chapter 26.5 and the IDEA.

Chapter 26.5 provides multiple avenues for resolution of disputes on the allocation of responsibility between public agencies for provision of educationally and medically necessary assessments and PT and OT services called for in an IEP, including a due process hearing with the procedural safeguards of the IDEA. The determination of which agencies are responsible for such services requires a factual inquiry, as well as interpretation of the contractual arrangements between the parties and the obligations imposed by statute, and the due process decision is binding on all agencies at the hearing. Therefore, OAH has jurisdiction to hear Student's dispute regarding CCS's assessments and provision of services, and the authority to make a binding decision on CCS's responsibility to provide assessments and related services under Student's IEP's. Accordingly, CCS's motion to be dismissed is denied.

As to CCS's motion to limit issues to the two years preceding the filing of Student's complaint, the complaint does not clearly allege that CCS was a party to the tolling agreement with Student, and Student does not oppose that motion. The statute of limitations for special education due process claims in California is two years, consistent with federal law. (Ed. Code, § 56505, subd. (1); see also 20 U.S.C. § 1415(f)(3)(C).) The statute of limitations operates to bar claims based upon facts outside of the two year period. (*J.W. v. Fresno* (9th Cir. 2010) 626 F.3d 431, 444-445 (*J.W. v. Fresno*)). Accordingly, CCS's motion to limit Student's issues against CCS to those arising no earlier than two years prior to the filing of Student's complaint is granted.

ORDER

1. The motion to dismiss by CCS is denied.
2. The issues against CCS at hearing are limited to issues arising no more than two years prior to the filing of Student's complaint.
3. The matter will proceed as scheduled.

DATE: August 18, 2014

/s/

ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings